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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

KEVIN NEILSON, GRINDROD INTERNATIONAL LIMITED and ATLAS TRADING AND SHIPPING LIMITED,

*Petitioners,*

*v.*

SEABOARD CORPORATION, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This petition concerns an employee's right to demand arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, implemented at 9 U.S.C. § 201 *et seq.* (the "Convention"). It particularly concerns the proper scope and application of Article II(2) of the Convention, relating to when an arbitration clause must be "signed by the parties or contained in an exchange of letters or telegrams," and directly implicates a split of authority between the Court of Appeals for the Fifth Circuit in *Sphere Drake Ins. PLC v. Marine Towing*, 16 F.3d 666 (5th Cir. 1994), and the Second Circuit in *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999). The Missouri Court of Appeals sided with the Second Circuit.

The petition also concerns the separate question of who decides arbitrability when an arbitration provision "clearly and unmistakably" refers questions of arbitrability to the arbitrators within the meaning of this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), but, on its own "threshold" analysis, the court considers the claims do not "invoke" the agreement.

The Petition presents the following questions:

1. Does Article II(2) of the Convention require arbitration of the employer's claims when the employment agreement prepared and signed by the employer contains an arbitration clause, was tendered

to an employee but not signed by him, and thereafter was performed without objection by either party and arbitration is sought by the employee?

2. Alternatively to 1, is an arbitration clause enforceable pursuant to Section 2 of the FAA when it is in writing within the meaning of the FAA but is not "signed by the parties or contained in an exchange of letters or telegrams" within the meaning of Article II(2) of the Convention?

3. When a defendant seeks to compel arbitration pursuant to an arbitration agreement which clearly and unmistakably refers questions of arbitrability to the arbitrators, may a Court refuse to compel arbitration in respect of arbitrability on the basis of its own threshold determination that the claims alleged in the complaint "do not invoke the agreement"?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The following were parties to the proceedings before the Missouri Supreme Court:

Kevin Neilson
Atlas Trading & Shipping Limited
Grindrod International Limited

Additionally, the following parties are defendants in the underlying action pending before the Circuit Court of Jackson County, Missouri but were not parties to the motions which are the subject of this petition:

Grindrod Limited
Unicorn Shipping (Proprietary) Limited

Grindrod Limited's shares are publicly traded on the JSE Securities Exchange in South Africa. Atlas Trading & Shipping Limited, Grindrod International Limited and Unicorn Shipping (Proprietary) Limited are directly or indirectly wholly owned subsidiaries of Grindrod Limited.

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Kevin Neilson, Grindrod International Limited and Atlas Trading and Shipping Limited hereby respectfully petition for a writ of certiorari to review the order of the Missouri Court of Appeals, Western District, issued in the action before it bearing docket number WD67628, in respect of which the Missouri Supreme Court declined to grant discretionary review in an order issued in the action before it bearing docket number SC89170.

## OPINIONS BELOW

The decision of the Missouri Court of Appeals, Western District, (1-a),[1] was filed on January 15, 2008. 248 S.W.3d 27 (Mo. App. W.D. 2008). By order dated March 4, 2008, the Missouri Court of Appeals, Western District overruled petitioners' motion for rehearing and denied their motion to transfer to the Supreme Court of Missouri. By order entered on April 15, 2008, the Supreme Court of Missouri entered its order denying petitioners' application to transfer the cause to that Court. (29-a). Those orders are not officially reported. The Judgment and Order of the Circuit Court of Jackson County, Missouri, issued on December 21, 2006 (12-a), is not officially reported.

## JURISDICTION

The order of the Supreme Court of Missouri was entered on April 15, 2008. A petition for writ of certiorari is due on or before July 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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1. References to the Appendix hereto are cited as "__-a".

## TREATIES AND STATUTES INVOLVED

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. § 201 *et seq.* (the "Convention").

9 U.S.C. § 2 provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Article II of the Convention, implemented pursuant to 9 U.S.C. § 201, provides as follows:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article VII(i) of the Convention, provides as follows:

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country when such award is sought to be relied upon.

## STATEMENT OF THE CASE

### A. Statutory Framework

This Court has very recently reaffirmed that the FAA represents a "national policy favoring arbitration" which "applies in state as well as federal courts and forecloses state legislative attempts to undercut the enforceability of arbitration agreements." *Preston v. Ferrer*, 128 S. Ct. 978, 2008 U.S. LEXIS 2011, * 13 (Feb. 20, 2008)(internal quotation marks omitted). The decision for which Petitioners seek review presents a challenge to that national policy by denying an employee's motion to compel arbitration of his employer's claims.

The FAA provides in part that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. "Commerce" is defined to include "commerce among the several States or with foreign nations. . . ." *Id.* § 1.

The Convention, also applicable, provides that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. "Arbitration agreements subject to the Convention are enforced in accordance with Chapter 2 of the FAA." *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135,

146 (2d Cir. 2001)(citations and internal quotation marks omitted)(citing 9 U.S.C. § 201). An arbitration agreement exists within the meaning of the Convention if "(1) there is a written agreement; (2) the writing provides for arbitration in the territory of a signatory of the convention; (3) the subject matter is commercial; and (4) the subject matter is not entirely domestic in scope." *Id.*, 241 F.3d at 146 (citations omitted).

In determining whether an agreement to arbitrate is enforceable under the FAA and the New York Convention, general state contract law principles apply. *I.K. Bery, Inc. v. Irving R. Boody & Co., Inc.*, 2000 U.S. Dist. LEXIS 1872, * 7 (S.D.N.Y. 2000)(citing *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987)). "The FAA does, however, preempt state law rules that invalidate arbitration provisions on grounds not applicable to other contracts." *Id.* (citing *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 687 (1996)). It has long been the rule that "[a]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

**B. The Present Dispute**

Respondent Seaboard Corporation is a holding company of subsidiaries and affiliates which engage in various commodities businesses worldwide. Starting in February 1999, Petitioner Neilson's employer was Seaboard Overseas Limited ("SOL"), a Bermuda-based subsidiary. Neilson was located in Bermuda and had an employment contract with SOL dated February 15, 1999.

In late 2000, Neilson relocated from Bermuda to North Carolina. He remained employed with SOL at that time, however, and on January 1, 2001, SOL issued Neilson a revised employment contract signed on behalf of SOL. Although Neilson did not sign the agreement, he received it and worked for SOL pursuant to its terms.

Paragraph 16 of the Employment Contract contains a "Governing Law and Jurisdiction" clause which provides in relevant part as follows:

> 16- Governing Law and Jurisdiction
>
> Any dispute between any of the parties hereto or claim by a party against another party arising out of or in relation to this agreement or in relation to any alleged breach thereof shall be finally determined by arbitration in accordance with the rules then in force of the American Arbitration Association by a panel of three arbitrators. The arbitration proceedings shall take place in New York, New York or such other location as the parties in dispute hereafter may agree upon; and such proceedings will be conducted in the English language and shall be governed by the laws of Bermuda. . . . [LF. 1127-28.[2]]

Rule 6(a) of the applicable AAA Employment Arbitration rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction,

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2. References to the Legal File before the Missouri Court of Appeals Western District are cited as "(LF. ___)."

*including any objections with respect to the existence, scope or validity of the arbitration agreement.*" (LF. 1087)(Emphasis added.).[3] Rule 6(b) provides that "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." (LF. 1087).

Neilson relocated again in July 2002 from North Carolina to Kansas. Neilson's principal responsibility continued to involve running the commodities trading operations in Bermuda. From the time he received the 2001 contract with SOL until his resignation in 2005, Neilson was never provided with a new contract by any Seaboard entity, nor did he ever discuss any change in his employment status at any time.

Neilson resigned from SOL on April 26, 2005. He thereafter entered an agreement to be a consultant to Island View Shipping, Inc., a subsidiary of defendant Grindrod Limited. Subsequently, certain other members of the commodity trading group resigned from the Seaboard Group and accepted positions with the Grindrod Group. Following meetings in Kansas City, Missouri on May 9-10, 2005, a term sheet was negotiated setting forth "terms pursuant to which Grindrod Limited (or its nominee) would purchase certain assets of Seaboard Overseas Limited and employ certain employees of SOL." (LF. 987-89).

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3. A copy of the AAA Employment Arbitration Rules is also available at www.adr.org/sp.asp?id=32904.

Ultimately, an Asset Purchase Agreement dated May 24, 2005 was entered between SOL on the one hand and Grindrod subsidiaries Atlas Trading & Shipping Limited ("Atlas") and Grindrod International Limited ("GIL") on the other (the "Purchase Agreement"). (LF. 1015-1041). Section 9.07(a) of the Purchase Agreement provides as follows:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. *The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.* [LF. 1036. Emphasis added.]

"Dispute," as the term is used in the preceding paragraph, is a defined term in the Purchase Agreement which means:

> Any dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement. [LF. 1019.]

Section 9.07(b) of the Purchase Agreement incorporates the International Arbitration Rules of the American Arbitration Association, (LF. 1036). Article 15 of the applicable AAA arbitration rules provides that

"[t]he tribunal shall have the power to rule on its own jurisdiction, *including any objections with respect to the existence, scope or validity of the arbitration agreement.*" (LF. 1108)(Emphasis added.).[4]

## C. Procedural Posture

### 1. Seaboard's Missouri Lawsuit

Respondents commenced a lawsuit against defendant Neilson and various Grindrod entities (including Petitioners herein) in the Circuit Court of Jackson County, Missouri on or about August 26, 2005. (LF. 1043-68). Respondents allege that, while employed by Seaboard, Neilson was tasked in early 2005 with negotiating with the Grindrod Group over a possible sale of Seaboard's commodity trading business. (LF. 1052-53, ¶¶36-40). In the course of these negotiations, Respondents allege, Neilson accepted an offer of employment from Grindrod and thereupon resigned from Seaboard in April 2005. (LF. 1053-54, ¶¶41-52).

According to the complaint, Neilson "conspired" with Grindrod to persuade other members of Seaboard's commodities trading group to resign and join Grindrod and to "force" Seaboard to sell its commodities trading business to Grindrod at well below market value pursuant to the Purchase Agreement. (LF. 1056-57, ¶¶63-64). Respondents allege that the only reason Grindrod and Neilson were able to implement this

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4. A copy of the AAA International Dispute Resolution Procedures can be found on the AAA website at www.adr.org/sp.asp?id=33994.

"conspiracy" is because Neilson breached fiduciary duties to Seaboard and improperly used confidential and proprietary information belonging to plaintiffs and improperly disseminated it to Grindrod. (LF. 1058, ¶71). Respondents further allege that the Grindrod entities, including Petitioners Atlas and GIL, conspired with Neilson, (LF. 1065-65, ¶123-131), tortiously interfered with Neilson's contractual and fiduciary obligations to Respondents, (LF. 1065-67, ¶132-146), and tortiously interfered with their "prospective business expectancy or prospective business relationship" with their customers. (LF. 1067, ¶147-155). Respondents' allegations of wrong-doing are denied by Neilson, Atlas and GIL.

### 2. The Missouri Proceedings

Defendants removed the action to the Federal District Court for the Western District of Missouri pursuant to 9 U.S.C. § 205, which allows for removal of cases in which the claims relate to an arbitration agreement which is governed by the Convention. (LF. 27-33). Petitioners moved to remand the matter to the state court, alleging that the Federal District Court lacked subject matter jurisdiction. (LF. 124). By order dated August 1, 2006, the District Court granted Respondents' motions to remand, concluding that it lacked subject matter jurisdiction. (LF. 717).[5]

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5. Under Eighth Circuit case law, a District Court order remanding a case to state court on the basis that it lacks subject matter jurisdiction is not appealable, "whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Transit Casualty Co. v. Certain Underwriters at Lloyds,*

(Cont'd)

On August 17, 2006, Petitioners thus commenced an action in the Supreme Court of New York seeking to compel arbitration, Case No. 602907/06 (the "New York Action"). (LF. 973). On August 18, 2006, Petitioners filed a motion before the Circuit Court of Jackson County, Missouri seeking a stay of the Missouri proceedings pending resolution of the New York Action. (LF. 915). Respondents thereafter filed a motion in the Missouri action seeking to enjoin Petitioners from proceeding with the New York Action.

By order dated October 23, 2006, the trial court in Missouri denied Petitioners' motion to stay the proceedings pending the outcome of the New York Action. (14-a). In so doing, the Court undertook to examine the merits of Petitioners' application to compel arbitration, noting that

> [t]he decision turns on whether or not the alleged facts of Plaintiffs' Petition fall under the arbitration clause contained in the January 1, 2001 foreign service offer letter sent from SOL to Kevin Neilson and the Asset

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(Cont'd)

119 F.3d 619, 624-25 (8th Cir. 1997)(holding that action removed to district court pursuant to 9 U.S.C. § 205 and thereafter remanded for lack of subject matter jurisdiction is "unreviewable" pursuant to 28 U.S.C. § 1447(d)). On the other hand, because the district court remanded for a lack of subject matter jurisdiction, "it lacked jurisdiction to make any substantive rulings, and, thus, 'no rulings of the federal court have any preclusive effect on the substantive matters before the state court.'" *Id.* at 624 (quoting *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1182 (9th Cir. 1989)).

> Purchase Agreement dated May 24, 2005 between Seaboard Overseas Limited and Atlas and Grindrod.

(20-a). The Court ultimately concluded that the claims fall under neither arbitration clause and thus are not subject to arbitration. (21-a; 23-a). Accordingly, the Court denied Petitioners' requested stay.

By order dated October 27, 2006, the lower court granted Respondent's motion to enjoin Petitioners from proceeding with the New York Action, (LF. 1213-22), reiterating its finding that "the defendants' claims of a right to compel arbitration do not apply to the claims raised by plaintiffs in their Petition." (LF. 1219).

On November 1, 2006, Petitioners filed their Notice of Appeal from the lower court's orders denying Petitioners' requested stay, granting Respondents requested injunction, and holding that Respondents' claims are not subject to arbitration. (LF. 1284-85). On December 21, 2006, to address an appellate jurisdictional inquiry by the clerk for the Missouri Court of Appeals, Western District, the lower court issued a Judgment and Order holding as follows:

> For the reasons stated in the court's order dated October 23, 2006, a copy of which is appended hereto, it is adjudged and decreed that the defendants Kevin Neilson, Grindrod International Limited and Atlas Shipping and Trading Limited have failed to provide [sic] the existence of any valid or pertinent arbitration agreement that would subject or

> require the arbitration of any of plaintiffs' claims raised in this lawsuit. Accordingly Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration is DENIED. The parties will litigate plaintiffs' claims in this lawsuit. [12-a.]

In an opinion dated January 15, 2008, the Missouri Court of Appeals, Western District affirmed. (1-a). As to Neilson, the Court found that the arbitration provision in the employment agreement was unenforceable under the Convention because Neilson had not signed it and because it had not been contained in an "exchange of letters or telegrams" within the meaning of Article II(2) of the Convention. (8-a). The Court did not address Neilson's alternative argument that the arbitration provision was nevertheless enforceable under Chapter 1 of the FAA, 9 U.S.C. ¶ 2, which merely requires the agreement to be in writing; however, implicit in its ruling was the conclusion that the agreement was not enforceable under the FAA. The Court also did not address Neilson's contention that questions of arbitrability should have been referred to the arbitrators given the agreement's incorporation of arbitration rules which clearly and unmistakably so provide.

As to Atlas and GIL, the Appeals Court rejected (in a footnote) Petitioners' contention that arbitrability must itself be submitted to arbitration and concluded that "none of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement." (9-a, n.5).

## REASONS FOR GRANTING THE PETITION

The Missouri Court's refusal to recognize and enforce the parties' arbitration agreements is directly contrary to the strong Federal policy in favor of arbitration which is embodied in both the FAA and the Convention—as well as in the prior decisions of this Court—and creates an untenable conflict by which an arbitration agreement may be fully enforceable under the FAA but is deemed unenforceable by virtue of the United States' accession to the Convention, a treaty whose express purpose was to foster and encourage the recognition and enforcement of international arbitration agreements.

Moreover, the decision directly implicates a split of authority between the United States Court of Appeals for the Fifth Circuit on the one hand, and the Second Circuit and other courts on the other, on the proper interpretation and applicability of the Convention's "signature" requirement. Under the Fifth Circuit's view, the question of whether the contract containing the arbitration provision was "signed by the parties or contained in an exchange of letters or telegrams" should never even have been reached in this case.

The decision is also directly contrary to the prior decisions of this Court which have made clear that an agreement which "clearly and unmistakably" refers questions of arbitrability to the arbitrators must be enforced.

### A. The Missouri Court's Decision Is In Direct Conflict With The Terms Of The Convention And Clear Federal Policy Favoring Enforcement Of Agreements to Arbitrate

The Missouri Court ruled the arbitration provision in Neilson's Employment Contract was unenforceable under the Convention because it was neither "signed by the parties" nor "contained in an exchange of letters or telegrams." Although Neilson alternatively contended that the arbitration clause was nevertheless enforceable under Section 2 of the FAA, the Missouri Court did not address this argument. By so holding, and by declining to consider the enforceability of the agreement under 9 U.S.C. § 2, the Missouri Court effectively ruled that the Convention fully preempts the FAA insofar as enforcement of international agreements to arbitrate is concerned. This ruling is in direct conflict with the express terms of the Convention itself and is contrary to clear federal policy favoring the enforcement of agreements to arbitrate.

Nothing in the Convention or in Chapter 2 of the FAA, by which it was implemented, suggests that it was the intention of the United States, in acceding to the Convention, to restrict in any way the existing rights of parties to enforce arbitration agreements. Rather, the Convention was intended to supplement the FAA and provide *additional* means of enforcing arbitration agreements. Indeed, this is explicitly stated in Article VII of the Convention, which preserves to "any interested party . . . any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country

where such award is sought to be relied upon." This is a clear statement that nothing in the Convention should be construed to "preempt" more favorable existing arbitration law in the US or to preclude "interested parties" from relying on domestic arbitration law to the extent the Convention does not provide the desired relief.

The United Nations Commission on International Trade Law ("UNCITRAL"), which has historically played a major role in drafting and interpreting United Nations' treaties,[6] has published its own recommendation, adopted on July 7, 2006, (25-a),[7] concerning the interpretation of Article II(2) of the Convention, in which it has specifically recommended that Article II(2) "be applied recognizing that the circumstances described therein are not exhaustive." (28-a).

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6. UNCITRAL was established by the United Nations General Assembly in 1966 (*see* Resolution 2205(XXI) of 17 December 1966) and was given a mandate to "further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law." *See* www.uncitral.org/uncitral/en/about/origin.html.

7. The UNCITRAL recommendation can also be found on the UNCITRAL web site at the following address: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/AZE.pdf.

UNCITRAL further recommends as follows:

> that article VII, paragraph 1 of the Convention . . . should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement. [28-a.]

Given the plain language of Article VII of the Convention and this clear statement of intent by UNCITRAL, any ruling that an arbitration agreement which falls outside the Convention cannot be enforced in the individual signatory states pursuant to domestic law is plainly wrong. The Missouri Court made no such explicit holding in affirming the decision below, but this was undeniably the effect of its ruling. The Missouri Court cited (at 4-a., n.3) to 9 U.S.C. § 208, which provides that "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." Section 208, however, was not intended to alter the application of Chapter 1 of the FAA except insofar as it was applied to the Convention.

Where a contract does not fall within the Convention's writing requirement but does fall within the coverage of the FAA, the Convention does not preclude the Court from granting appropriate relief solely under the provisions of Chapter 1. To the contrary, the Court should be bound to follow Chapter 1 and to enforce the arbitration agreement pursuant to its terms.

Had the Missouri Court applied Chapter 1 of the FAA in the present case, it would have had no choice but to find the arbitration agreement enforceable. It is established Federal policy under the FAA that an arbitration provision is enforceable on precisely the same terms as every other provision of a written contract. 9 U.S.C. § 2. In particular, it is well established that the FAA contains no requirement that a contract be signed in order for its arbitration clause to be enforceable. *See, e.g., Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975).

There is no doubt that the Employment Contract as a whole was an enforceable agreement between SOL and Neilson by virtue of the facts that (1) SOL prepared, signed and provided the document to Neilson; (2) Neilson accepted it; and (3) both parties subsequently tendered performance under it. *See Marlar v. Yellow Transp.*, 2004 U.S. Dist. LEXIS 26653 (W.D. Mo. 2004)(finding binding arbitration agreement existed under the FAA where employer sent employees e-mail notice of arbitration policy which was to be binding on employees who continued their employment beyond a specified date). Accordingly, because the Employment Contract as a whole is a valid, enforceable contract, and because arbitration clauses may be treated no differently than any other contract term in an agreement, 9 U.S.C. § 2, the arbitration agreement is valid irrespective of the fact that Neilson did not sign the agreement, and it should have been enforced by the Missouri Court.

**B. The Missouri Court's Decision Directly Implicates An Existing Conflict Between the Fifth Circuit And Other Circuit Courts As To Whether Article II(2)'s "Signed" Requirement Applies To Arbitration Clauses In Written Contracts**

As noted above, Article II(2) of the Convention provides that "The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The Missouri Court found that Neilson's Employment Contract was governed by the Convention and found that there was not an "agreement in writing" to arbitrate within the meaning of Article II(2).

Although the Missouri Court did not acknowledge it, however, there is presently a split of authority among the United States Courts of Appeal concerning the proper interpretation of Article II(2), and if the Missouri Court had followed the ruling of the Court of Appeals for the Fifth Circuit in *Sphere Drake Inc. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994), the question of whether Neilson's Employment Contract was "signed by the parties or contained in an exchange of letters or telegrams" should never even have arisen.

According to the Fifth Circuit, Article II(2) requires one to differentiate between "an arbitral clause in a contract" and a separate stand-alone "arbitration agreement." Only the latter must be either (a) signed by the parties or (b) contained in an exchange of letters or telegrams. *Id.* at 669. Put more concretely, under *Sphere Drake*, because the arbitration clause here at

issue was contained in an otherwise enforceable contract between Neilson and SOL—and was not a separate arbitration agreement—it was not necessary that the agreement be "signed by the parties or contained in an exchange of letters or telegrams."

Other courts, most notably including the Court of Appeals for the Second Circuit in *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210 (2d Cir. 1999), have taken a different view of Article II(2) and have concluded that both arbitration clauses in contracts *and* separate arbitration agreements must be signed or contained in an exchange of letters or telegrams. *See also Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003).

Although the Fifth Circuit's decision has been criticized, Petitioners submit that its interpretation is more consistent with the broad Federal policy favoring arbitration and is also more consistent with UNCITRAL's stated recommendation that Article II(2) "be applied recognizing that the circumstances described therein are not exhaustive." (29-a). Moreover, it is more consistent with existing domestic law, embodied in the FAA, that an arbitration provision in a contract must be enforced on the same basis as any other contractual term, and while it must be in writing it need not be signed by the parties or meet any other "special" criteria to be enforceable.

This clear split of authority between the Circuits on this important question of the proper interpretation of Article II(2) of the Convention should be resolved by this Court and justifies granting Petitioners' petition.

### C. The Missouri Court's Decision Narrowly Construing the "Signed" Requirement Of The Convention Conflicts With Clear Federal Policy Favoring Enforcements Of Agreements To Arbitrate

The Missouri Court's narrow interpretation of Article II(2) of the Convention in finding that there was not an "exchange of letters or telegrams" in the present case within the meaning and intent of Article II(2) is likewise inconsistent with the clear purpose of the Convention to promote the enforcement of agreements to arbitrate disputes. As noted above, the Missouri Court's holding creates an anomalous situation in which Neilson's arbitration agreement would be fully enforceable under the FAA but, because of the U.S.'s accession to the Convention, the arbitration provision is thereby unenforceable. This is entirely backwards. The clear intent of the Convention is that arbitration is to be encouraged, *see, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)(stating that the goal of Convention is to encourage the recognition and enforcement of commercial arbitration agreements); *Rhone Mediterranee Comp. v. Lauro*, 712 F.2d 50, 54 (3d Cir. 1983)("the policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate."), and as the UNCITRAL recommendation makes clear, the Convention's writing requirement should be given the broadest, most inclusive interpretation possible towards this end.

In the present case, where the employment agreement was written and signed by SOL, provided to and received by Neilson, and where Neilson subsequently tendered and SOL accepted performance

thereunder without objection, it is fundamentally contrary to Federal policy and the intent of the Convention to hold that the arbitration provision within that otherwise enforceable contract is unenforceable because Neilson did not sign the document or otherwise return it to SOL. By signing the agreement, SOL clearly intended to be bound by it, and by performing under it without objection, Neilson clearly did as well. Accordingly, the arbitration clause in Neilson's Employment Contract should be enforced.

### D. The Missouri Court's Decision Is In Direct Conflict With This Court's Precedents Concerning Who Decides Arbitrability

It is established authority of this Court that a "clear and unmistakable" agreement to arbitrate arbitrability must be enforced. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). There can be no dispute that the arbitration clause in the Purchase Agreement with Atlas and GIL, which provided that "[t]he Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, *including Disputes over arbitrability or jurisdiction*," (emphasis added), constitutes a "clear and unmistakable" agreement to arbitrate arbitrability. Moreover, both Neilson's Employment Contract and the Purchase Agreement incorporated arbitration rules of the American Arbitration Association which specifically refer to the arbitrators "[a]ny objections with respect to the existence, scope or validity of the arbitration agreement." The Circuit Courts of Appeal which have considered such provisions uniformly have found that they clearly and unmistakably provide that questions

of arbitrability are to be decided by the arbitrators. *See e.g., Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminex Int'l Co. LP v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005). Notwithstanding these clear provisions, the Missouri Court totally ignored the issue of who should decide arbitrability under Neilson's Employment Contract and denied arbitration for Atlas and GIL under the Purchase Agreement on the threshold question of arbitrability as follows: "because we hold that the claims alleged by the Plaintiffs do not invoke the Agreement, the Agreement cannot control. Therefore this point is denied." (9-a, n. 5).

In so holding, the Missouri Court eschewed the controlling authority of *First Options* and ignored the clear intent of the parties by substituting its own judgment for that of the arbitrators on the question of whether the subject disputes fall within the scope of the arbitration agreement here at issue. There can be no mistaking the intent of the parties to have as broad an arbitration agreement as possible; indeed, this intent is made explicit in the agreements.

There is nothing in *First Options*, nor in other relevant case law, to suggest that the Court may impose its own "threshold" analysis of whether a clear and unmistakable agreement to arbitrate arbitrability should be enforced. It is an agreement to arbitrate just like any other, and the parties should have a full and fair opportunity to present their respective positions to the arbitrators as agreed. If, as Respondents contend, arbitration should not ultimately be compelled in respect of these claims, then that is for the arbitrators to decide,

and they are, of course, free to dismiss the arbitration if they consider that is the appropriate resolution of the dispute.

But one thing is clear: by agreement, the parties specifically agreed to divest the Court of the power to make the determination of what claims are or are not subject to arbitration, and that agreement *must* be honored. Indeed, the Court is no more authorized to refuse arbitration on this question of arbitrability than it would be permitted to grant judgment on a claim on the merits, rather than refer it to arbitration, on the ground that the party seeking arbitration stood no chance of actually prevailing on the claim in any event. That kind of prejudgment is simply not allowed.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT FILED JANUARY 15, 2008

## IN THE MISSOURI COURT OF APPEALS
### WESTERN DISTRICT

No. WD - 67628

Opinion Filed: January 15, 2008

Seaboard Corporation, et al.,

Respondents

v.

Grindrod Limited, et al.,

Appellants

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
THE HONORABLE SANDRA C. MIDKIFF, JUDGE

Before: Howard, C.J., and Spinden and Holliger, JJ.

### INTRODUCTION

The Defendants in a civil action in Jackson County, Missouri, filed a Motion to Stay the litigation so that arbitration could be compelled in New York. The trial court denied the Motion to Stay and we affirm.

*Appendix A*

## FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs in this action, Seaboard, one of its subsidiaries and one of its divisions (collectively referred to as the Plaintiffs) filed a Petition against the Defendants in Jackson County. The Defendants are Grindrod and three of its entities (collectively referred to as the "Corporate Defendants") and Kevin Neilson, a former employee of Seaboard.

In their Petition, the Plaintiffs allege that, while still employed by them, Neilson began to work with the Corporate Defendants in order to force the Plaintiffs to sell a portion of their business for below market price. They additionally allege that the Defendants lured other employees of the Plaintiffs to leave and begin working for the Defendants. Against Neilson, the Plaintiffs allege fraud, negligent misrepresentation, breach of fiduciary duty, misappropriation of corporate opportunity, breach of confidentiality agreements, civil conspiracy, and tortious interference with prospective business expectancy or prospective business relationships. Against the Corporate Defendants, the Plaintiffs allege civil conspiracy, tortious interference with contract, aiding and abetting breach of fiduciary duty, and tortious interference with prospective business expectancy or prospective business relationships.

After being served, the Defendants attempted to remove the action to the federal court based on the international Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the

"Convention"),[1] implemented by the United States Code in Chapter 2 of Title 9. 9 U.S.C. § 201 (2000). The Defendants argued that all of the claims were covered by arbitration agreements. They argued that an employment letter that contained an arbitration clause covered the claims against Neilson and that the claims against the Corporate Defendants were covered by the Asset Purchase Agreement for the sale of the Plaintiffs operation. The federal court denied the removal based on a finding that neither arbitration clause was applicable.

The Defendants then filed a motion to stay the Jackson County litigation based on their filing a motion to compel arbitration in New York.[2] Following extensive briefing and a hearing, the trial court denied the motion to stay. Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, the denial of the motion to stay is immediately appealable. 9 U.S.C. §16 (2000); Missouri Supreme Court Rule 74.01(b) (2007). The trial court based its decision, like the federal court, on the finding that there was no "valid or pertinent arbitration agreement" between any of the parties.

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[1] The Convention applies in this case because some of the Plaintiffs and Defendants are foreign corporations. Neither party disputes that that the Convention is applicable in this case.

[2] The Defendants filed in New York based on the forum selection clause in the Purchase Asset Agreement arbitration clause.

*Appendix A*

## STANDARD OF REVIEW

Our review of a denial of a motion to stay is *de novo*. *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 227-28 (Mo. App. W.D. 2002). We first "determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." *Dunn Indus. Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003). In determining whether an arbitration agreement exists in this case, we look to the FAA and the Convention. If there is any conflict between the FAA and the Convention, the Convention controls. 9 U.S.C. § 208 (2000).[3] *See also M&C Corp. v. Erwin Behr GnthH& Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996).

## ANALYSIS

The Defendants allege five points of error in their brief. However, these five points essentially allege that the trial court erred in not finding that the arbitration clause in the alleged Employment Letter applied to the claims against Neilson and that the arbitration clause in the Asset Purchase Agreement applied to the claims against the Corporate Defendants.

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[3] 9 U.S.C. § 208 states: "Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

*Appendix A*

## THE EMPLOYMENT LETTER

Neilson argues that the arbitration clause in his Employment Letter requires that all of the claims alleged against him be submitted to arbitration. The Plaintiffs argue that since Neilson did not sign the Employment Letter, under the Convention, there is no enforceable arbitration clause.[4] We agree.

Neilson first began his employment with a subsidiary of the Plaintiffs in 1995. In 1999, Neilson began working for another subsidiary of the Plaintiffs, which was a Bahamian company. This subsidiary would issue employment letters for its foreign service employees. In December 2000, Neilson relocated from Bermuda to North Carolina for personal reasons. As a result of the move, to reflect his new domicile, Neilson was sent a new Employment Offer letter, dated January 1, 2001. This is the Employment Letter that Neilson bases his claim for arbitration on.

The letter contained a paragraph compelling arbitration for any "claim by a party against another party arising out of or in relation to this agreement." It also stated that Neilson was required to "sign and return" a copy of the letter to signify his acceptance of the terms and conditions of employment contained in

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[4] The Plaintiffs also argue that even if we were to find that the Employment Letter was a valid arbitration agreement, it was for a previous position that Neilson had with one of its subsidiaries and was no longer applicable at the time of the alleged misconduct. We do not reach the issue.

the letter. Neilson concedes that he never signed or returned the letter. The Plaintiffs argue that in July of 2002, he left his position in North Carolina and began working for one of the Plaintiffs' other divisions in Overland Park. The Petition alleges that it was while in this position that he committed the alleged misconduct and resigned from his position in April 2005.

Under Article II of the Convention, in order for an arbitration clause to be enforceable, it must be an "agreement in writing." The article defines "agreement in writing" to include "an arbitral clause in a contract or an arbitration agreement, *signed by the parties* or contained in an exchange of letters or telegrams." (Emphasis added.)

A representative of the Plaintiffs signed the Employment Letter. However, as Neilson concedes, he did not sign the letter, and, based on our review of the record, there was no "exchange of letters or telegrams." Therefore, under the Convention, there is no enforceable arbitration agreement.

Neilson attempts to compare this case to *Polytek Engineering Co. v. Jacobson Cos.*, 984 F.Supp. 1238 (D. Minn. 1997), and *Gabriel Capital, L.P. v. Caib Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66 (N.Y. App. Div. 2006). However, neither of these cases presents facts analogous to our case.

In *Polytek*, Polytek was attempting to purchase rubber-recycling equipment from Jacobson that it

needed for a contract with Hebei Import & Export. 984 F.Supp. at 1239. The Purchase Order between Polytek and Jacobson referenced and incorporated the contract between Polytek and Hebei, and the contract was attached to it. *Id.* The Hebei contract contained an arbitration clause. *Id.* A dispute arose and Polytek sought arbitration against Jacobson. *Id.* Jacobson denied being a party to the arbitration agreement. *Id.* at 1240.

The court in *Polytek* found that under the Convention, Jacobson was indeed a party to the contract. *Id.* at 1241. The court pointed to facsimiles that were sent and received between Polytek and Jacobson. In one such facsimile, a representative of Polytek asked that Jacobson issue a purchase order with the Hebei contract attached. *Id.* A representative of Jacobson responded that he would "issue a purchasing order with the contract as attachment to you within this week." *Id.* There was no argument that the purchase order governed the relationship between Polytek and Jacobson. *Id.* Additionally, there was correspondence between Jacobson and Polytek regarding the necessity of following a particular section of the Hebei contract. *Id.* A representative of Jacobson also confirmed the commencement of the contract. *Id.*

The decision of *Polytek* was based on the exchange of numerous facsimile and correspondence. Although the court does reference the "conduct" of the parties as illustrating the applicability of the contract, it does not hold that it was this behavior and not the "exchange of

letters or telegrams" that controlled their holding that there was an applicable "agreement in writing." As previously mentioned, there is no "exchange of letters or telegrams" of any type between Neilson and the Plaintiffs. Therefore, *Polytek* is of no help to Neilson.

In *Gabriel*, there was an exchange of facsimiles and correspondence between Gabriel and a subsidiary CAIB. 814 N.Y.S.2d at 68. Gabriel was attempting to argue that since the subsidiary and not CAIB signed the agreement, CAIB could not attempt to enforce it. *Id.* However, the court disagreed with this contention. The court held, "the agreement reached by [Gabriel] and CISEG, CAIB's subsidiary, via exchange of documents . . . incorporated by reference the arbitration clause of the purchase agreement signed by CISEG." *Id.* As in *Polytek*, the court does reference the actions of the parties leading to the presumption of an agreement, but the court does not reference this as a deciding factor and is merely dicta. *See Id.* at 68-69. Therefore, like *Polytek*, *Gabriel* is of no help to Neilson.

We affirm the trial court's denial for the motion to stay based on the finding that there was no applicable arbitration clause between Neilson and the Plaintiffs.

### The Asset Purchase Agreement

We now turn to the Asset Purchase Agreement that was used by the Corporate Defendants to purchase from the Plaintiffs a portion of their business operation. The Corporate Defendants argue that the claims in the

Plaintiffs' Petition fall under the "broad" arbitration clause in the Agreement and, therefore, must be arbitrated.[5] The Plaintiffs argue that the claims alleged in the Petition do not fall within the scope of the Agreement. We agree.

The arbitration clause in the Agreement states that "[a]ny Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction." "Dispute" is defined as:

> [A]ny dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this Agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

"Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not

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[5] The Corporate Defendants also argue that based on the arbitration clause found in the Agreement, it is the duly of an arbitrator to determine the arbitrability of these claims. However, because we hold that the claims alleged by the Plaintiffs do not invoke the Agreement, the Agreement cannot control. Therefore, this point is denied.

agreed to arbitrate." *Dunn Indus. Group, Inc.*, 112 S.W.3d at 435. "Arbitration must be compelled where a tort claim arises directly out of a dispute regarding the terms of the parties' contract" *Nw. Chrysler Plymouth, Inc. v. DaimlerChrysler Corp.*, 168 S.W.3d 693, 696 (Mo. App. E.D. 2005). "The relationship between the tort claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties." *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995), "At the very least, for a tort claim to be subject to arbitration under a broad arbitration clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract." *Rhodes v. Amega Mobile Homes Sales, Inc.*, 186 S.W.3d 793,798 (Mo. App. W.D. 2006) (quoting *Estate of Athon v. Conseco Finance Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002)). "Where a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled." *Nw. Chrysler Plymouth, Inc.*, 168 S.W.3d at 696.

In this case, the claims by the Plaintiffs against the Corporate Defendants include: civil conspiracy regarding the breach of Neilson's and other employees confidentiality agreements and the breach of Neilson's fiduciary duties; tortious interference with confidentiality contracts of the former employees; aiding and abetting a breach of Neilson's fiduciary duties; and tortious interference with prospective business expectancy or prospective business relationship

regarding interference with business relationships. The Petition does not reference the Agreement in any way other than to provide factual information.

None of the claims made by the Plaintiffs arise out of, relate to, or are connected with the Agreement, as the arbitration clause requires. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. Based on the claims raised in the Petition, the arbitration clause in the Agreement is not applicable. The denial of the motion to stay by the trial court is affirmed.

## Conclusion

The judgment of the trial court is affirmed. None of the claims by the Plaintiffs are covered by an arbitration agreement. Neilson did not sign the Employment Letter; therefore, there is no "agreement in writing" "signed by the parties" as required by the Convention. The claims brought by the Plaintiffs against the Corporate Defendants do not arise out of, relate to, or are connected to the Asset Purchase Agreement; thus, they are not subject to the arbitration clause found therein.

/s/ Victor C. Howard
Victor C. Howard, Chief Judge

Spinden and Holliger, JJ., concur

## APPENDIX B — JUDGMENT AND ORDER OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY DATED DECEMBER 21, 2006

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY**

Case No. 0516-CV27278

Seaboard Corporation, et al.,

Plaintiffs,

vs.

Grindrod Limited, et al.,

Defendants.

**JUDGMENT AND ORDER**

For the reasons stated in this court's order dated October 23, 2006, a copy of which is appended hereto, it is adjudged and decreed that the defendants Kevin Neilson, Grindrod International Limited and Atlas Shipping and Trading Limited have failed to provide [sic] the existence of any valid or pertinent arbitration agreement that would subject or require the arbitration of any of plaintiffs' claims raised in this lawsuit. Accordingly, Defendants' Motion to Stay Proceedings Pending Resolution of Petition To Compel Arbitration is DENIED. The parties will litigate plaintiffs' claims in this lawsuit.

It is further ordered that this Judgment and Order is immediately appealable pursuant to the Federal Arbitration Act, 9 U.S.C. § 16 and Rule 74.01(b) of the Missouri Rules of Civil Procedure and that there is no just reason for delay of an appeal of this Judgment and Order denying Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration.

IT IS SO ORDERED.

Date: 12/21/06

/s/ SANDRA C. MIDKIFF
Sandra C. Midkiff, Circuit Judge

## APPENDIX C — ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION TO COMPEL ARBITRATION IN NEW YORK DATED OCTOBER 23, 2006

## IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

Case No. 0516-CV27278
Division 1

Seaboard Corporation, et al.,

Plaintiffs,

v.

Grindrod Limited, et al.,

Defendants

## ORDER DENYING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION TO COMPEL ARBITRATION IN NEW YORK

This case comes before the Court on the Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York, filed on August 18, 2006. After consideration of the motion and suggestions filed by the parties, the Court now makes the following findings and orders:

*Appendix C*

***Factual Background***

On April 12, 1999, Kevin Neilson began working with Seaboard Overseas Limited (SOL), as Executive Vice-President and General Manager. As [sic] SOL, Neilson was internally classified as a foreign service employee because his job duties required him to perform his duties in Bermuda. SOL issues employment offer letters to all foreign service employees; however, it does not issue employment offer letters to employees whose job duties are based in the United States. In December 2000, Neilson relocated to North Carolina from Bermuda. SOL sent Neilson a new foreign service offer letter in January of 2001 because of his relocation. The letter stated that Neilson remained as a foreign service employee and was still required to perform his same job duties in Bermuda. SOL signed the foreign service offer letter and set [sic] it to Nielson. Nielson, however, never signed or returned the letter to SOL.

On July 1, 2002, Neilson left SOL and took a job as Vice-President of Grains and Trading for Seaboard Overseas and Trading Group (SOTG). SOTG does not issue employment agreements or offer letters with arbitration clauses to domestic employees whose job duties are based in the United States. Neilson relocated to the Kansas City area and worked in Kansas as a domestic employee of the SOTG division of Seaboard Corporation until he resigned on April 27, 2005.

In approximately January 2005, Neilson was approached by Grindrod, South Africa's leading shipping

and logistics company about pursuing a joint venture with or acquiring the assets of plaintiff's profitable overseas shipping and trading business. Plaintiffs allege in this lawsuit, that Neilson engaged in secret negotiations with Grindrod to implement a conspiracy to force Plaintiffs to transfer their overseas business and that in fact Plaintiffs were forced to transfer SOL's overseas business to Grindrod for a price far below fair market value. In this lawsuit, plaintiffs raise claims that Neilson breached his fiduciary duties, the confidentiality agreement that he signed, and committed various other tortious acts.

***Procedural History:***

Plaintiffs originally filed this lawsuit in the Circuit Court of Jackson County, Missouri on August 26, 2005. Neilson was personally served on October 27, 2005. Neilson filed his Notice of Removal on December 8, 2005. Grindrod International Limited (GIL) and Atlas Trading & Shipping Limited (Atlas) were served through the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters on January 19, 2006 and January 10, 2006 respectively. On January 27, 2006, Atlas and GIL filed a Supplemental Notice of Removal and Consent to Removal. On December 22, 2005, Plaintiffs filed a Motion to Remand Neilson's removed case back to the Circuit Court. On February 16, 2006, Plaintiffs filed a Motion to Remand Atlas and Grindrod's case back to this Circuit Court. On August 1, 2006, Judge Gaitan granted Plaintiffs' Motions to Remand this case, after concluding

that the federal district court lacked subject matter jurisdiction over the claims raised in this case. Judge Gaitan based his conclusion on his review of the undisputed facts of the case. He found that (1) there was no valid written signed agreement to arbitrate existing between plaintiffs and Neilsen; and (2) plaintiffs' claims in this case do not arise out of the Asset Purchased Agreement between Plaintiff SOL and Defendants Grindrod and Atlas. Thus, he concluded, defendants failed to demonstrate that there are pertinent arbitration agreements, and consequently, there was no federal subject matter jurisdiction over the claims raised in this lawsuit.

Following the remand of this case to this court, Defendants' filed a Motion to Stay Proceeding Pending Resolution of Petition to Compel Arbitration in New York in this Court on August 18, 2006. Defendants' claim that New York is the proper forum for adjudication because there is a valid and enforceable arbitration provision in both of the contracts that govern the relationships between the parties. Defendant's Petition filed in the Supreme Court of New York seeks to compel arbitration of plaintiffs' claims herein pursuant to the Federal Arbitration Act, 9 U.S.C. § 4, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 206.

*Appendix C*

***Applicable Law:***

Defendant Neilson's Petition to Compel Arbitration filed in the Supreme Court of New York asks the Court to direct the Respondents (Seaboard Corporation) to arbitrate their claims against Petitioners asserted in the complaint in New York pursuant to the Asset Purchase Agreement and the Employment Contract between Neilson and Seaboard. Defendants base their claim for arbitration on 9 U.S.C. § 206, the Convention of the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. § 4, the Federal Arbitration Act. 9 U.S.C. § 206 states:

> A court having jurisdiction under this may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Article II of the Convention further states: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."

9 U.S.C. § 4 provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

> under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter in a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

The Eighth Circuit has stated of the Federal Arbitration Act that,

> As to whether 'the making of the agreement for arbitration' is in issue, *id.*, our Circuit has refined this inquiry to asking 1) whether the agreement for arbitration was validly made and 2) whether the arbitration agreement applies to the dispute at hand, i.e., whether the dispute falls within the scope of the arbitration agreement. *Medcam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005).

***Discussion:***

Here, Defendants propose [sic] seek to stay all activity in the case pending before this Court, pending the outcome of the Supreme Court of New York Petition regarding the issue of whether or not the parties should be compelled to participate in arbitration. Defendants argue that New York is the property forum for adjudication of these issues, despite the fact that the

instant action was commenced prior in time, and despite the fact that the U.S. District Court for the District of Missouri, Western Division, has already concluded that (1) there is no written agreement for arbitration existing between Neilson and the plaintiffs; and (2) the claims raised by plaintiffs against Atlas and Grindrod do not arise out of the Assets Purchase Agreement.

This court already has jurisdiction over the parties and claims asserted by the parties in this case. Defendants argue that this court cannot and should not be bound by the findings or rulings of the district court. This court now re-examines the issues previously raised by defendants relating to their attempts to compel arbitration under the Assets Purchase Agreement and the Employment Agreement on which they rely. The decision turns on the question of whether or not the alleged facts of Plaintiffs' Petition fall under the arbitration clause contained in the January 1, 2001 foreign service offer letter sent from SOL to Kevin Neilson and the Asset Purchase Agreement dated May 24, 2005 between Seaboard Overseas Limited and Atlas and Grindrod.

1. *Agreement between Plaintiff SOL and Neilson*: This Court must first determine whether or not there was a valid agreement between the parties that would create a duty to arbitrate the complaints alleged in Plaintiffs' Petition. The undisputed facts show that Neilson was sent a foreign service offer letter on January 1, 2001 after he relocated from Bermuda to North Carolina in December 2000. Neilson was to

maintain his duties as a foreign service employee in Bermuda. The offer letter was sent by SOL and it contained an arbitration clause. Neilson did not sign the foreign service offer letter and failed to return the letter to SOL. Soon thereafter (in July of 2002) Neilson *left* SOL and became the Vice-President of SOTG, and was classified as a domestic employee. SOTG did not issue employment agreements or offer letters with arbitration clauses to domestic employees whose job duties are based in the United States. Neilson never signed the foreign service offer letter. In *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999), *abrogated on other grounds, Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir, 2005), the Court concluded that because plaintiff and defendant did not have an arbitration agreement in writing, the arbitration clause was not binding.

Based on these undisputed facts, there was no written agreement in place that would subject Plaintiff to the arbitration clauses in this case. Further, Neilson became a domestic employee in 2002, when he signed on as Vice-President at SOTG. The letter no longer applied when Neilson left his job at SOL. The complaints that Plaintiffs allege in their Petition occurred long after Neilson had left his position as Executive Vice President of SOL.

2. *Asset Purchase Agreement between SOL and Grindrod and Atlas*: With regard to Defendants GIL and Atlas, Plaintiffs in their Petition, assert allegations of facts against these two defendants that occurred

before the Asset Purchase Agreement was even signed. The Asset Purchase Agreement contains a clue which states as follows:

> Any Dispute must be exclusively and definitively resolved through final and binding arbitration. The Parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes, including Disputes over arbitrability or jurisdiction.

Section 9.07(a).

The word "dispute" as used in the preceding paragraph is defined in the Agreement as follows:

> Any dispute, controversy or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement or the actions carried out under this agreement, including any dispute as to the construction, validity, interpretation, enforceability or breach of this Agreement.

Plaintiffs state that the entireties of their claims are based on conduct of Atlas and GIL that occurred from January 2005 to May 2005—before the Asset Purchase Agreement was signed. Defendants argue that the broad arbitration clause contained in Section 9.07 stating that "the parties agree that this is a broad form arbitration agreement designed to encompass all possible Disputes,

including Disputes over arbitrability or jurisdiction" subjects the plaintiffs to arbitration for their claims. In *Clarus Med. v. Myelotec, Inc.*, 2005 U.S. Dist. LEXIS 30540, the Court stated that "an Order to compel arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Plaintiffs' claims in this case do not relate to the Asset Purchase Agreement, but rather to the conduct that preceded the signing of the document. In Plaintiffs' Petition, they have alleged claims against GIL and Atlas of involving civil conspiracy, tortuous interference with contract, aiding and abetting a breach of fiduciary duty and tortuous interference with prospective business expectancy or prospective business relationship. This Court finds that the alleged claims in Plaintiffs' Petition do not fall within the Asset Purchase Agreement; Plaintiffs' claims do not arise from the Asset Purchase Agreement.

Additionally, plaintiffs correctly assert that the Asset Purchase Agreement does not apply to all parties in this action. Only SOL, Atlas and GIL are parties to the Asset Purchase Agreement. There is no contractual obligation compelling Seaboard Corp. and SOTS to arbitrate. These separate corporate entities are not parties to any valid agreement to arbitrate. Because the Convention does not apply and there is no arbitration clause that requires all or any plaintiffs to arbitration, the Defendants' motion to Stay Pending Resolution of

Petition to Compel Arbitration in New York should be denied.

**IT IS HEREBY ORDERED** that Defendants' Motion to Stay Proceedings Pending Resolution of Petition to Compel Arbitration in New York is DENIED. The parties will litigate plaintiffs' claims, as well as any arbitration claims asserted by defendants, in this lawsuit.

**IT IS FURTHER ORDERED** that a Case Management Conference is now set for December 11, 2006 at 10:00 a.m., at which tie lead trial counsel should be present, and should be prepared to discuss a proposed pretrial schedule, a firm trial setting and any pending pretrial motions that are ripe for ruling.

**IT IS SO ORDERED.**

/s/ SANDRA C. MIDKIFF
Sandra C. Midkiff, Circuit Judge

Date: October 23, 2006

## APPENDIX D — RECOMMENDATION REGARDING THE INTERPRETATION OF ARTICLE II, PARAGRAPH 2, AND ARTICLE VII, PARAGRAPH 1, OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

*The United Nations Commission on International Trade Law,*

*Recalling* General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object or promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

*Conscious* of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

*Recalling* successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within

the United Nations system in the field of international trade law to coordinate legal activities in this field,

*Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

*Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

*Bearing in mind* differing interpretations of the form requirements under the Convention that the results in part from differences of expression as between the five equally authentic tests of the Convention,

*Taking into account* article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign

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[1] United Nations, *Treaty Series*, vol. 330, No. 4739.

arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favorable than the Convention,

*Considering* the wide use of electronic commerce.

*Take into account* international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations

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[2] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

*Appendix D*

Convention on the Use of Electronic Communications in International Contracts,[6]

*Taking into account also* enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

*Considering that*, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[6] General Assembly resolution 60/21, annex.

## APPENDIX E — ORDER OF THE SUPREME COURT OF MISSOURI DENYING APPLICATION TO TRANSFER DATED APRIL 15, 2008

## IN THE SUPREME COURT OF MISSOURI

**SC89170**
**WD67628**
January Session, 2008

Seaboard Corporation, et al.,

Respondents

v.

Grindrod Limited, et al.,

Appellants

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri court of Appeal, Western District, it is ordered that the said application be, and same is hereby denied.

Breckinridge, J., not participating.